

SENATE BILL REPORT

SB 5310

As of December 8, 2011

Title: An act relating to false claims against the government.

Brief Description: Concerning false claims against the government.

Sponsors: Senators Kline, Pflug and Keiser.

Brief History:

Committee Activity: Judiciary: 2/04/11, 2/15/11 [DPS, DNP, w/oRec]; 12/06/11.
Ways & Means: 2/24/11, 11/29/11 [w/oRec-JUD].

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5310 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Harper, Vice Chair; Pflug, Ranking Minority Member; Hargrove, Kohl-Welles, Regala and Roach.

Minority Report: Do not pass.
Signed by Senator Carrell.

Minority Report: That it be referred without recommendation.
Signed by Senator Baxter.

Staff: Aldo Melchiori (786-7439)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Steve Jones (786-7440)

Background: State and local governments make numerous payments to individuals and businesses in connection with governmental contracts, programs, and services. While a governmental entity can, in theory, recover undeserved payments under tort or contract law, false claims for payment may go undiscovered.

A private citizen is unable to initiate an action, on behalf of an injured state governmental entity, against another party submitting a false claim for payment. However, a private citizen

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may do so on behalf of the federal government under the federal False Claims Act. It is reported that at least nineteen other states have a state version of the False Claims Act that applies to a broad range of government programs, and nine other states have False Claims Act provisions that are limited to Medicaid fraud claims.

Summary of Bill: The bill as referred to committee was not considered.

Summary of Bill (Recommended Substitute): A person who knowingly presents a false or fraudulent claim for payment to the government is liable to the government for a civil penalty between \$5,000 and \$10,000 plus three times the amount of damages the government sustains. Government entities include all state and local government bodies. A claim does not include, in relation to any public works contract, a request for payment or other submission which is conditioned upon compliance with a contractual time requirement that limits the contractor's ability to guarantee the accuracy of the submission, provided that the contractor later amends the claim when the claim overstated the actual cost.

Either the Attorney General (AG) or a private party, known as the relator, may bring a civil action for such a violation on behalf of any government entity. The AG must only investigate a violation, bring an action, or participate in an action if there are funds appropriated for this purpose.

If the AG brings the action and is successful, the relator must be awarded between 15 and 25 percent of the proceeds or settlement. The relator must be reimbursed for reasonable expenses and attorneys' fees by the defendant. The AG is also entitled to be reimbursed for reasonable expenses and attorneys' fees by the defendant.

A relator bringing the action, if successful, must be awarded between 25 to 30 percent of the proceeds of the action or settlement. The relator is also entitled to receive reimbursement of reasonable expenses and attorneys' fees from the defendant.

If the relator is convicted of criminal conduct arising from his or her role in the fraud, the relator must be dismissed from the action and may not receive any share of the proceeds.

If the AG does not proceed with the action and the relator conducts the action, the court may award the defendant reasonable attorneys' fees and expenses if the defendant prevails.

The false claims penalty account is created in the state treasury. All receipts from civil penalties assessed against persons or entities committing Medicaid fraud, all monies from settlements that originated from federal false claims act settlements, and all civil penalties and any other monies received pursuant to a state false claims action, must be deposited into the account.

Remedies are provided to employees who suffer workplace discrimination or reprisals because of participation in a false claims action. An employee who suffers workplace discrimination must bring an action within three years of when the retaliation occurred. Jurisdiction, discovery rules, and other procedures are specified for false claims actions.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Recommended Substitute): Amends the definition of claim to provide that it does not include, in relation to any public works contract, a request for payment or other submission which is conditioned upon compliance with a contractual time requirement that limits the contractor's ability to guarantee the accuracy of the submission, provided that the contractor later amends the claim when the claim overstated the actual cost.

Provides that if the defendant prevails at trial, the court may award the defendant reasonable attorneys' fees and costs against the relator.

Provides that the act does not apply to a claim or series of claims submitted to a city where the total amount in controversy does not exceed \$50,000.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Proposed Substitute as Heard in Committee (Judiciary):

Testimony From 2011 Regular Session

PRO: The primary reason to adopt a state false claims act is fiscal. False claims acts return millions of dollars to the states who have their own act in place. There are three reasons a state should have a false claims act with qui tam provisions. One, there are some cases that are not being brought at all if you don't have a state false claims act. An example of these cases include average wholesale price cases against drug manufacturers. State pension cases are not going to be brought at the federal level. Second, cases that are brought by the federal government, but because Washington has no state false claims act, the state loses the opportunity to fully investigate the claims and determine what the case is worth to the state. Had there not been states pursuing some claims in conjunction with the federal government, the cases would have settled for less. The third type of cases are those brought wholly within the state. People will come forward from industries that operate just within the state, who don't know about the federal act, but they will know about the state act and in my experience you get access to information from people you would never have found had there not been a state act. There is far more money that is taken, than is ever uncovered. This act allows a private party to bear the burden of bringing and conducting an action when the state lacks the resources to do so.

CON: The language in the proposed sub does not quite get to where we need this to be for the Associated General Contractors (AGC). What we're concerned about refers to changed conditions or events, and those are not the only kinds of claims that are subject to the Mike M. Johnson. Any claim a contractor submits under a public works contract is subject to very tight timelines; and if we don't meet the timelines, we lose all right to that claim. Also, there are reasonable differences between a contractor and the client as to what specifications are in a contract, and when a state has this act, then the state and local governments use it as a

negotiating tool which is unfair, especially in the face of what is required under Mike M. Johnson decision.

The state already has a false claims act, but without the qui tam provisions. The federal act already provides incentive for Medicaid related claims. We have to defend these actions, those with and without merit, and there is considerable fiscal impact to hospitals. Sections 3 through 8, regarding qui tam provisions are what we are concerned about. We support a robust program for the AG to investigate and prosecute fraud. This act gives essentially the right to bring suit to private bounty hunters. Simply harassing defendants into settlement is not a valid antifraud activity. Intentional acts should be properly defined to make it clear because for certain types of insurance policies, intentional acts are not covered. If it is not an intentional act, the insurance provider must defend the suit and indemnify; we think if you mean intentional acts then you should make that clear. There will be litigation over what knowingly means. This act is not fair as it relates to the defendants. When a defendant prevails, the only way they can get their attorneys' fees is if the action was brought for purposes of harassment.

Testimony From 2011 2nd Special Session

PRO: We are trying to target bad actors only, not those that make honest mistakes. It is to the advantage of all honest contractors to weed out the bad actors. The purpose of the new proposed substitute is to help minimize the fiscal impacts identified by the AG. This is a good way to discover large scale fraud.

CON: Construction bids are assembled quickly and are estimates of pricing submitted in good faith based upon changing circumstances. There is no such thing as actual cost, just an estimate of costs. There is not a proliferation of construction fraud in Washington so the bill is not needed. Agencies could use the threat of false claims cases against contractors who initiate change orders. The qui tam provisions opens the door to litigation over honest errors rather than truly fraudulent claims. The prevailing party provision should apply to both parties in all cases. Relators should be given awards for providing information, but should not be allowed to bring cases without AG approval.

OTHER: The new language appears to be out of conformity with the federal act because it does not require the Attorney General to exercise due diligence in investigations. The state would recover more money if the AG brought the cases. If the bill is not brought into compliance with the federal act, the state could lose federal dollars.

Persons Testifying (Judiciary):

Persons Testifying From 2011 Regular Session

PRO: Dan Miller, Bergere Mantague PC; Jesse Wing, WA Employment Law Association; Dan Kalish, Heyrich Kalish McGuigan.

CON: Douglas Roach, Van Collins, AGC; Cliff Webster, WA Liability Reform Coalition; Tim Layton, WA State Medicaid Association; Mel Sorenson, WA Defense Trial Lawyers (WDTL) Property Casualty; Lisa Thatcher, WA State Hospital Association (WSHA).

Persons Testifying From 2011 2nd Special Session

PRO: Senator Kline, prime sponsor.

CON: Van Collins, Douglas Roach, AGC; Patrick Connor, National Federation of Independent Businesses; Cliff Webster, Liability Reform Coalition.

OTHER: Dawn Cortez, AG Medicaid Fraud Control Unit; Larry Shannon, WA State Association for Justice.

Staff Summary of Public Testimony on Recommended Substitute (Ways & Means):

PRO: The state is not doing enough to detect fraudulent claims. Other states have much higher recovery rates. The federal Department of Justice (Office of Inspector General) will provide a 10 percent bonus in matching funds if this state enacts a False Claims Act. Federal matching funds will pay 75 percent of the costs of this bill, and state fraud recoveries will cover the rest of the cost. The bill also provides protections for whistleblowers.

CON: This legislation creates a bounty-hunter process that is unnecessary. Public works contractors have significant objections to this bill; these objections were not adequately addressed in the policy committee. This bill is unnecessary because state and local government already have state and federal laws to address fraudulent claims. Both state and local government will pay higher bid costs as a result of this legislation, and the construction industry will be harmed. Private parties who bring *qui tam* lawsuits under this bill should be forced to pay attorneys fees if the suit is not successful. Paying a share of court recoveries to private plaintiffs will reduce the state's share, thereby offsetting any bonus payments received by the state from the federal government. The result will be a net loss to the state.

Persons Testifying (Ways & Means): PRO: Senator Kline, prime sponsor.

CON: Larry Stevens, Mechanical Contractors Association, National Electrical Contractors Association; Jesse Wing, Washington Employment Lawyers Association; Lisa Thatcher, WSHA; Tim Layton, WA State Medical Association; Cliff Webster, Pharmaceutical Research and Manufacturers of America; Mel Sorenson, WDTL; Van Collins, AGC.